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Nos. 86-509 and 86-564

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

BEATY MAE GILLIARD, *et al.*,
Appellees.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, *et al.*,
Appellants,

—v.—

BEATY MAE GILLIARD, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF OF *AMICI CURIAE*

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J. Joseph Curran, Jr., Attorney General of Maryland;
Association for Children for Enforcement of Support;
Center for Constitutional Rights;

(List of *Amici* continued on inside front cover)

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Northwest Women's Law Center;
Parents Against Non Support;
Parents Organized for Support Enforcement, Inc.;
Parents Without Partners;
People Organized for Support Enforcement;
Single Parents United 'N' Kids;
Sisterhood of Black Single Women;
Women's Equal Rights Legal Defense and Education Fund;
Women's Equity Action League;
Women Employed;
Women's Law Project;
Women's Legal Defense Fund

IN SUPPORT OF APPELLEES

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Bureau of the Census, U.S. Dep't of Commerce, Population Characteristics Services, Household and Family Characteristics: March 1985, Current Population Reports, Series P-20, No. 411, at 11, Table G (1986) 1

Children in Poverty: Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 99th Cong., 1st Sess. (1985) (statement of Harold Ford, Chairman of Subcomm.) 47

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H.R. Select Comm. on Children, Youth and Families, 98th Cong., 1st Sess., Federal Programs Affecting Children (Comm. Print 1950) 39

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Statement of Senator Abnor, 130 Cong. Rec. S4807 (daily ed. April 25, 1984) 45

Statement of Senator Dole, 130 Cong. Rec. S4803 (daily ed. April 25, 1984) 45

Statement of Senator Domenici, 130 Cong. Rec. S4807 (daily ed. April 25, 1984) 45

Subucomm. on Oversight and Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 98th Cong. 1st Sess., Background Material on Poverty, 1st 14-16 (Comm. Print 1983) .. 47

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OTHER AUTHORITIES

Dr. Otis R. Bowen, quoted in "Program May Gain $3.2 Billion for Child Support" in N.Y. Times, Dec. 23, 1986 at B5, Col. 3 46

INTERESTS OF AMICI CURIAE

As described in detail in the attached appendix,[1] amici curiae are diverse entities with a shared interest in the well-being of needy families in this country, particularly low income families headed by one adult and receiving Aid to Families with Dependent Children.[2] Amici are deeply concerned by the effect that the statute and regulations challenged in this action are having on children in low income

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[1] The interests of amici are set forth in detail in the attached appendix to this brief. Pursuant to Rule 36.2 of the Rules of this Court, amici file this brief with the consent of all parties. Letters of consent are being filed with the Clerk of the Court.

[2] Approximately 90 percent of all children living in single parent families in this country are living with their mothers. Bureau of the Census, U.S. Dep't of Commerce, Population Characteristics Services, Household and Family Characteristics: March 1985, Current Population Reports, Series P-20, No. 411, at 11, Table G (1986).

families, who are being deprived of the full benefit of their child support income from an absent parent.

Amici are concerned with child support issues because they recognize that the shortfall of child support income is a key cause of child poverty.[3] It is also an important cause of poverty among women; when non-custodial parents fail to accept continuing financial responsibility for their children or the full amount due fails to reach those children, a disproportionate financial burden falls upon custodial parents -- who are overwhelmingly women.

STATEMENT OF THE CASE

Amici curiae hereby adopt and incor-

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[3] Amicus curiae J. Joseph Curran Jr., Attorney General of Maryland, has the particular concern that the federal regulations at issue require his state to disrupt and undermine its own orderly child support scheme.

porate by reference the Statement of the Case in the brief for appellees.

SUMMARY OF ARGUMENT

42 U.S.C. § 602(a)(38) (Supp. III 1985), is a complex provision. It requires states, when making a determination of whether a particular "dependent" child is in "need" for the purposes of eligibility for Aid to Families with Dependent Children (AFDC) payments, to consider the existence in the same household of certain blood-related or adoptive siblings of the dependent child. States must also consider the income, resources and needs of these siblings of the dependent child. This procedure, properly understood, reduces AFDC benefits paid to dependent children wherever non-needy siblings living in the same household have income <u>which is available to the dependent children</u> to reduce their need for AFDC payments. North

Carolina law, which was not preempted by § 602(a)(38), greatly restricts the availability of child support income; it can only be made available in any measure to siblings of the supported child where to do so, in the custodial parent's opinion, is in the best interests of the supported child.

Appellants have relied on incorrect interpretation of the language of § 602(a)(38) to justify promulgating regulations known as the standard filing unit regulations. These regulations attempt to circumvent the law that child support income is not generally available to the supported child's needy siblings, for whom the supported child has no financial responsibility. The regulations further violate Congressional intent by requiring all independently supported children living with needy siblings to apply for AFDC and

to assign away their child support rights, thus depriving these children of the full benefit of their child support income.

This unfortunate situation was never intended by Congress, as is clear on examination of the language and legislative history of the Social Security Act, of which § 602(a)(38) forms part. The 98th Congress, in the same session that saw the enactment of § 602(a)(38), demonstrated, in other amendments to the Social Security Act, an intent to reduce the number of children deprived of their rightful support from absent parents. Congress did not intend to carve out an exception to this protection by depriving children of child support income if they live with needy siblings.

This Court should accept the arguments of appellees and amici curiae as to the correct interpretation of § 602(a)(38).

The interpretation urged by appellants is not only unsound as a matter of statutory interpretation, but also presents constitutional infirmities. Basing the right of a child to receive the full benefit of his or her child support income on whether or not his or her siblings are needy is a violation of the equal protection components of the fifth and fourteenth amendments. Classification of a child by his or her membership of a particular type of disadvantaged family withstands neither "heightened" scrutiny nor "rational relationship" scrutiny.

I. IN INTERPRETING § 602(a)(38) TO REQUIRE THE PROMULGATION OF THE STANDARD FILING UNIT REGULATIONS, APPELLANTS HAVE MISINTERPRETED THE LANGUAGE AND LEGISLATIVE HISTORY OF THE SOCIAL SECURITY ACT

Appellants Bowen and Kirk respectively head the federal and North Carolina agencies which together administer the AFDC program in North Carolina.[4] Since 1984, when the 98th Congress in its second session added § 602(a)(38) to the codified Social Security Act,[5] both agencies have issued regulations governing AFDC application procedures, purportedly implementing § 602(a)(38).

These post-DEFRA regulations, known as the standard filing unit regulations,

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[4] The AFDC program is a nationwide program to alleviate the problems of child poverty, established by subch. IV, pt. A of the codified Social Security Act of 1935, as amended, 42 U.S.C. §§ 601-615 (1982 & Supp. III 1985).

[5] Deficit Reduction Act (DEFRA), Pub. L. 98-369, § 2640(a), 98 Stat. 494, 1145 (1984).

affect needy households in three discrete ways. First, appellants now require that when a claim for AFDC is made on behalf of a needy child, all income, including child support income, of any blood-related or adoptive minor brothers and sisters living with the child must be treated as available to the needy child, reducing his or her needs and thus also reducing any potential AFDC payments.[6]

Second, appellants require that all blood-related or adoptive siblings of a needy child applying for AFDC must also apply for AFDC, regardless of their individual wishes and needs.[7]

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[6] 45 C.F.R. § 233.20(a)(2) (1986) (all types of income of applicants to be taken into consideration); Section 2360 (V)(A)(1), North Carolina 1985 AFDC Manual.

[7] 45 C.F.R. § 206.10(a)(1)(vii)(B) (1986); Section 2360 (III)(A), North Carolina 1985 AFDC Manual.

Third, if the household's income is low enough to qualify all applicants for AFDC benefits, federal and North Carolina regulations require that the applicants assign all rights to child support income to the North Carolina Department of Human Resources.[8] These child support assignment regulations existed before DEFRA to deal with the child support income of children voluntarily applying for AFDC. Under the practices challenged in this case, these same regulations are extended to siblings of these children, who do not need or want AFDC. Although $50 of the total amount of support collected on behalf of children in the family is returnable to the family per month,[9] a child required to apply for AFDC

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[8] 45 C.F.R. § 232.11(a)(1) (1986); Section 2365 II, North Carolina State 1985 AFDC Manual.

[9] 42 U.S.C. § 657(b)(1) (Supp. III 1985).

by the standard filing unit regulations is deprived of that part of his or her support income which exceeds his or her share of the $50 and the AFDC grant.[10]

(A) Appellants Have Erred In Treating The Child Support Income of Children Who Do Not Need AFDC As "Available" Income in Assessing AFDC Eligibility And Calculating AFDC Payments Of Their Needy Siblings

Section 602(a)(38) does not provide that state AFDC agencies must consider the child support income received by non-needy children as available to spend on their

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[10] In this case, for example, before the post-DEFRA North Carolina AFDC regulations came into effect, Aaron and Bernard Williams each received $100 per month in child support income. After they were required to apply for AFDC payments as a condition of eligibility for AFDC of their siblings Allen, Andre and Alise Waters, their total combined income dropped to $146 per month. Affidavit of Arvis Waters, Joint Appendix (J.A.) at 63-65. See Gilliard v. Kirk, 633 F. Supp. 1529, 1543 (W.D.N.C. 1986). This figure may overestimate their income if the $50 of their child support returned to the family is divided among all the children and not just between Aaron and Bernard.

needy siblings, thus reducing any AFDC payments to the latter. It provides that states must be aware of the existence and economic status of minor adoptive and blood related siblings living in the same household as child applicants for AFDC.[11] This

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[11] § 602(a)(38) states, in pertinent part, that a state AFDC plan must provide:

> that in making the determination under paragraph (7) <u>with respect to a dependent child</u> and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include -
> ...
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such... brother, or sister is living in the same home as the dependent child, and <u>any income of or available for</u> such ...brother, or sister shall be included in making such determination and applying such paragraph <u>with respect to the family</u> (notwithstanding Section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter)..."

42 U.S.C. § 602(a)(38) (emphasis added).

knowledge must then be applied in two ways in assessing the AFDC eligibility and calculating the AFDC payments of the child applicants.[12]

First, "with respect to a dependent child" the state agency is directed to include minor brothers and sisters living in the same household as the child in

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[12] North Carolina operates a two part procedure pursuant to 42 U.S.C. §§ 602 (a)(7) and (8)(Supp. III 1985) in determining eligibility and payment size. There is a state-set monthly monetary "need standard" per individual applying for AFDC. If the monthly gross income of those applying for AFDC exceeds 185% of the combined need standard for the number of individuals applying, no AFDC is payable. If the applicants have a sufficiently low income to pass this eligibility test, the AFDC payment is calculated by subtracting their monthly "countable net income" (i.e., income after disregarding certain types and amounts of income set out in 42 U.S.C. § 602(a)(8)) from the state-set "payment standard", which is 50% of the combined need standards for that number of individuals. The resulting sum is paid to the AFDC recipients. See generally, J.A. at 51-53; Section 2360, North Carolina AFDC 1985 Manual (explanation of AFDC application procedures).

making the eligibility and payment assessments required by 42 U.S.C. §§ 602(a)(7) & (8). In North Carolina the "need" of an individual child varies in money terms depending on the size of the household in which he or she lives. The larger the size of the household is, the smaller the individual "need standard" and "payment standard" (which is half of the need standard), to reflect economies of scale in larger households. See J.A. at 51-53. Section 602(a)(38) requires that North Carolina base its assessment of eligibility and payment size on individual need and payment standards which reflect not just the number of children and caretaker relatives applying for AFDC, but also the number of independently supported children

not applying for AFDC in the household.[13] In this way the economies of scale produced by the presence in the household of a child who does not need AFDC are taken into account.[14]

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[13] Thus in a six person household, in which two children are independently supported, and the other three children and caretaker relative apply for AFDC, the four individual applicants could be assessed using unit need and payment standards reached by multiplying the six-person household individual standards (which are lower than the four-person household individual standards) by four.

[14] The DEFRA conference report explaining § 602(a)(38) to the 98th Congress specified that the section would end the practice under "present law" (pre-DEFRA) whereby those applying for assistance might exclude from the AFDC assessment "certain family members who have income which might reduce the family benefit." By including these members in the filing unit for the initial selection of the appropriate individual need and payment standards, the family benefit is immediately reduced. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 1445, 2095. Appellants' mistaken belief that being included in the "filing unit" means being an applicant or recipient of AFDC, actually increases benefits paid out to families, as

Second, "with respect to the family," § 602(a)(8) directs state agencies to include "any income of or available for such brother, or sister" in making the eligibility and payment assessments.[15] As explained in note 12, supra, North Carolina assesses applicants for AFDC as a unit, using aggregated need and payment standards based on the number of individual applicants and non-applicant parents and siblings in the household. Section 602(a)(38) directs the North Carolina AFDC agency to deduct from the unit's payment standard "any income of or available for"

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more people are required to receive benefits.

[15] The income of these minor siblings is thus taken into consideration as the income of "any other individual (living in the same house as such child and relative [claiming AFDC]) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid." 42 U.S.C. § 602(a)(7).

the independently supported siblings who do not need AFDC.

The phrase, "any income of or available for" has, however, been misconstrued by appellants to mean all income of the siblings of AFDC child applicants,[16] including legally restricted child support income. This interpretation blatantly disregards a profusion of cases establishing that the availability of certain types of legally restricted income for the purposes of §§ 602(a)(7) & (8) assessments is limited. See, e.g., Owens v. Heckler, 753 F.2d 675 (8th Cir. 1985) (HHS could not reduce a family's AFDC grant by the amount of Social Security extended student benefits received by a student and actually needed for educational expenses); Hayes v.

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16 45 C.F.R. § 233.20(a)(2) (1986); Section 2360(V)(A)(1), North Carolina 1985 AFDC Manual.

City University of New York, 503 F. Supp. 946 (S.D.N.Y. 1980), aff'd, 648 F.2d 110 (2d Cir. 1981) (state cannot treat federal and state educational assistance that cannot actually be used to pay the everyday costs of living as available income).

Congress can, of course, limit the application of the availability principle, but in the absence of explicit Congressional action, the availability principle must be observed, as this Court noted as recently as 1985. This Court stated then that "[this] Court's cases applying the [availability] principle clearly reflect that its purpose is to prevent the states from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need". Heckler v. Turner, 470 U.S. 184, 201 (1985) (emphasis

added).[17] Where Congress has not specifically displayed an intent to cut back on the extent of the principle, it continues to govern interpretation of the Social Security Act. Cf. id. at 210 (intent to cut back on availability principle as applied to mandatory tax withholdings evinced by Congress in 1981).

It had been well established for many years before the enactment of § 602(a)(38) that child support income, which is restricted by law in North Carolina and other states to the use and benefit of the supported child, is not income generally

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[17] See also, e.g., Van Lare v. Hurley, 421 U.S. 338 (1975) (state may not reduce the shelter allowance provided to AFDC recipient when a non-paying lodger resides in the home); Lewis v. Martin, 397 U.S. 552 (1970) (state may not reduce AFDC assistance by considering the income of "male person assuming the role of spouse"); King v. Smith, 392 U.S. 309 (1968) (state may not assume that man living with child's mother is a "substitute father" who meets child's needs).

available for § 602(a)(7) and (8) assessments of the need of other siblings within the same family.[18] This Court itself affirmed that principle at an earlier stage in this case fifteen years ago.[19]

Where, as in North Carolina, children are not legally responsible for the support of their needy siblings, child support income is ordered to meet a particular child's reasonable needs, not those of siblings by another absent parent.[20] The

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[18] See Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Bourque v. Commissioner of Welfare, 6 Conn. Cir. Ct. 685, 308 A.2d 543 (1972); Scott v. Commonwealth Dept. of Public Welfare, 46 Pa. Commw. 403, 406 A.2d 594 (1979); Sledge v. Commonwealth Dept. of Public Welfare, 43 Pa. Commw. 553, 402 A.2d 1130 (1979).

[19] Gilliard v. Craig, 409 U.S. 807 (1972), aff'g. 331 F. Supp. 587 (W.D.N.C. 1971).

[20] In North Carolina, child support orders are issued to "meet the reasonable needs of the child for health, education, and maintenance, having due regard to the

child support is payable to the custodial parent for the benefit of the child.[21] While the custodial parent, acting as a trustee of the child support income, may indirectly benefit from the child support income (e.g., by renting a home with the support money that houses both the child and the custodial parent), that parent may not personally profit by using the funds for others, such as the supported child's needy siblings. This does not mean that child support income must be spent exclusively on items that only the supported child may use. The money must be spent in the child's best interests, however, which

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estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case" N.C. Gen. Stat. § 50-13.4(c) (1984) (emphasis added).

[21] N.C. Gen. Stat. § 50-13.4(d) (1984).

principle would certainly preclude the custodial parent from diverting the funds to meet expenses incurred solely by her other children. Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962).

Appellants take the somewhat confusing simultaneous positions that § 602(a)(38) abolishes the availability principle insofar as the availability of child support income is concerned, but that even so, the child support income is automatically used to the supported child's benefit when considered available to his or her needy siblings. Brief for federal appellant at 26, 38-39; brief for [state] appellants at 13. Both of these arguments are faulty.

The standard filing unit regulations require child support income of minor siblings in the same household as needy children to be treated as income available

to spend on the needy children, and countable in reducing their AFDC payments. In fact, while § 602(a)(38) provides that AFDC payments should be reduced to reflect the economies of scale produced by the presence in the household of children who do not need AFDC, it certainly does not require that AFDC payments should be further reduced by the amount of child support received by these children. As detailed in Section I(D), infra, the 98th Congress never suggested that a child's right to child support from an absent parent is balanced by a duty to spend that money on his or her needy siblings, as the standard filing unit regulations imply. Neither the conference report commending the DEFRA bill to both Houses of Cong-

ress,[22] nor the language of § 602(a)(38) itself, make any reference to child support income. Had Congress intended to mandate states to ignore judicial authority, including Supreme Court authority concerning the "availability" of child support income, the conference report would surely have pointed this out.[23] It is instructive

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[22] H.R. Conf. Rep. No. 98-861, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News, 1445 et seq.

[23] Federal appellant's interpretation of an excerpt from Senate Finance Committee discussions early in the consideration of DEFRA, which the federal appellant contends proves that Congress intended to mandate consideration of child support as available income, is not convincing. (Brief for federal appellant, at 27). In that excerpt, child support income is referred to as income "which might reduce the family benefit." This was obviously an uninformed preliminary discussion, given the conclusory nature of the description of child support income as available income despite the numerous cases holding child support income of non-needy children to be generally unavailable for the purpose of AFDC eligibility assessment of their needy siblings. It is a well established principle of statutory con-

to note that while § 602(a)(38) specifically refers to the consideration of "Title II" benefits of non-needy siblings ("benefits provided under subchapter II of this chapter"), Congress chose not to include any reference to child support.[24]

As is more fully argued in the brief for appellees, Congress had no intention to

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struction that the conference report recommended to both Houses (which in this case had dropped any reference to child support income) carries far greater weight than any other legislative history. American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978).

[24] Amici curiae take no position as to whether Congress has successfully overruled prior federal law restricting the use of Title II benefits to the child on whose behalf it is paid, and note that the Supreme Court has not yet reached this question, although lower courts have. See Bowen v. Lesko, 639 F. Supp. 1152 (E.D. Wis. 1986) (order granting preliminary injunction), appeal docketed, No. 86-744, 55 U.S.L.W. 3372 (U.S. Nov. 5, 1986); Cunningham v. Toan, 728 F.2d 1101 (8th Cir. 1984), vacated, 469 U.S. 1154 (1985) (remanded for further consideration in light of DEFRA), modified on remand, 762 F.2d 63 (8th Cir. 1985).

preempt state law governing the restriction of the use of child support income.[25] To the contrary, the 98th Congress recognized that child support income is a special type of income essential to the child's well-being.[26]

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[25] North Carolina law reserving child support to the use and benefit of the child in whose name the order issues has not been preempted by § 602(a)(38). While Congress is free to require states that participate in the AFDC program to comply with federal rules that are in conflict with state law, Townsend v. Swank, 404 U.S. 282 (1971), it can only do so where AFDC applicants and recipients are concerned. For supported children who do not wish to apply for or receive AFDC benefits, the general preemption rule applies: in the domestic relations arena, state law prevails over federal law unless there has been a direct federal enactment to the contrary to prevent major damage to federal interests. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1972). There has been no such direct enactment, nor showing of damage. See brief for appellees at Section I.

[26] See Section I(D), infra, for a discussion of Congressional recognition of the importance of child support income. Consider also, 42 U.S.C. § 602(a)(31) (Supp. III 1985), which, in states where stepparents are not legally responsible for

There is no support for appellants' extraordinary view that it is always to a child's benefit to use his or her child support, specifically ordered to meet his or her reasonable needs, to replace the AFDC funds of his or her needy siblings. In the absence of any language in § 602(a)(38) justifying their position, appellants' regulations attempt to give minor children the responsibility to support their own adoptive and half-siblings with funds earmarked by state

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stepchildren, provides that part of the stepparent's income may still be considered in assessment of the stepchildren's eligibility for AFDC, but only after application of certain "income disregards." One of these disregards removes from consideration "payments by such stepparent of...child support with respect to individuals not living in such household." 42 U.S.C. § 602(a)(31)(D). The child support income ordered by a court to be paid by the stepparent to his or her own absent children is recognized as an important obligation to children for whom the stepparent has legal responsibility, which should be honored.

courts for use in the best interests of the supported child alone. By treating child support income of the siblings of needy children as income which is always available to those needy children, appellants' regulations violate state law without preempting it. This Court should declare these regulations invalid.

(B) Appellants Have Erred In Requiring Children Who Do Not Want Or Need AFDC To Apply For AFDC

The standard filing unit regulations promulgated by appellants, purportedly to implement § 602(a)(38), in fact misconstrue that statute in a fashion that goes far beyond merely considering child support income as "available" for expenditure on needy siblings. Instead of simply requiring caretaker relatives applying on behalf of their needy children to file evidence of the numbers and legally unrestricted income

of other minor siblings in the household, as § 602(a)(38) dictates, the standard filing unit regulations require that all such minor siblings must become applicants for AFDC as a condition for eligibility for AFDC of the needy children. No longer may the caretaker relative decide whether it would be in the best interests of a particular independently supported child to apply for AFDC. Examination of the language of § 602(a)(38) reveals that this requirement has no statutory justification.

Had Congress intended that all independently supported children should, without exception, be required to apply for AFDC and be treated as dependent children if they live with others who seek AFDC, it would not have carefully chosen the language of § 602(a)(38) in order to avoid the presumption that such children are necessarily dependent children. Section

602(a)(38) not only distinguishes the needy dependent child from the non-needy siblings to which it refers (using the phrase "with respect to the dependent child"), it also defines the siblings of the needy dependent child as children who meet the conditions described in §§ 606(a)(1) and (2). To be a dependent child eligible for AFDC,[27] a child must not only meet the conditions described in § 606(a)(1) and (2), but must also be needy.[28]

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[27] AFDC is defined by 42 U.S.C. § 606(b) (Supp. III 1985) as "money payments with respect to a dependent child or dependent children."

[28] § 606 provides, in pertinent part:

> The term "dependent child" means a needy child (1) who has been deprived of parental support or care ..., and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student ....

42 U.S.C. § 606(a).

Amici curiae recognize, as did Congress, that some independently supported children of AFDC recipient siblings may need and want AFDC, food stamps or medicaid. Such children, as appellants acknowledge, have always been free to apply for aid. The independently supported children who are plaintiffs in this case, on the other hand, do not want or need AFDC and do not want to be treated as dependent children. Congress intended to avoid such involuntary treatment in enacting § 602(a)(38).

Appellants, however, misread § 602(a)(38) to arrive at the erroneous conclusion that all children living with the same parent are dependent children who must actually apply for AFDC for themselves if any one of them wishes to do so. Had Congress intended this conclusion to be drawn, it could easily have amended §

606(a) itself to include all minor siblings of dependent children living in the same household within the definition of dependent child. It did not do so.

(C) Appellants Have Erred In Requiring Children Who Do Not Want Or Need AFDC To Assign Their Child Support Income To The State

The consequence of requiring all independently supported children to apply for AFDC if needy siblings with whom they live do so, is that supported children are losing the full benefit of their child support income.[29] This happens because recipients of AFDC are required to assign to the North Carolina Department of Human Resources their rights to collect their

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29 See, supra, note 10 and accompanying text.

child support, pursuant to 42 U.S.C. § 602(a)(26)(A) (Supp. III 1985).[30]

If, as argued above, non-dependent children were not forced to apply for or receive AFDC, § 602(a)(26)(A) would not apply to them. Indeed, a clear indication that § 602(a)(38) does not require non-dependent children to apply for AFDC is that if it did, § 602(a)(26) would by its literal terms require an assignment of the children's support rights to the North Carolina Department of Human Resources. Yet, the legislative history of

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[30] Section 602(a)(26) provides, in pertinent part:

> as a condition of eligibility for aid, each applicant or recipient will be required - (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed...

42 U.S.C. § 602(a)(26).

§ 602(a)(26) establishes that the section was never intended to be used to reduce children's income or to reimburse the state for AFDC payments to children for whom the supported child has no financial responsibility.

Section 602(a)(26) predates § 602(a)(38) by ten years. The former section was added to the Social Security Act by the 93rd Congress, which also established the "IV-D" child support enforcement program. 42 U.S.C. §§ 651-667 (1982 & Supp. III 1985). Congress acted after being informed by the Senate Finance Committee that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents."[31] The

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31 S. Rep. No. 1356, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News, 8133, 8145.

amended Act provided that child support income was no longer to be treated as income in calculating AFDC payments.[32] Instead, the Social Security Act requires AFDC recipients to assign support rights to the state[33] and then ignores child support income when calculating AFDC payments. The states are allowed to collect the support and to retain support payments collected

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[32] See discussion of 1975 Amendments in Quarles v. St. Clair, 711 F.2d 691, 694-5 (5th Cir. 1983). See also 10 N.C.A.C. 49 B.0308 (once child support income is assigned to state, it stops being countable income for purposes of determining the amount of the AFDC check).

[33] The caretaker relative of a child, as applicant for AFDC on the child's behalf, has the legal ability to make the child support available to the state, where to do so is in the child's best interests. Where the child is deprived of the full benefit of the child support income, it is not in the child's best interests to assign. The assignments required by the standard filing unit regulations violate the terms of court-ordered support payments and thus violate state law, which, as stated in Section I(A), was not preempted by § 602(a)(38).

"as reimbursement for any past assistance payments made to the family for which the State has not been reimbursed." 42 U.S.C. § 657(b).

Congress had no intention, however, that any child should be left financially worse off because of child support assignment. With needy children in mind, it provided that if the child support collected exceeds amounts payable in AFDC benefits (for example, if sizeable arrears are paid in a lump sum), then once the state and federal agencies have been reimbursed for past AFDC payments, any remaining support is passed back to the family and the family is removed from the welfare rolls.[34]

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[34] See Dept. of Human Resources v. Bagley, 142 Ga. App. 353, 235 S.E.2d 734, aff'd, 240 Ga. 306, 240 S.E.2d 867 (1977).

> [T]he assignment of an accrued right of support [pursuant to § 602(a)(26)] to the state is for the purpose of allowing the state to initiate collection litigation. It is cer-

42 U.S.C. § 657(b)(4). While this system has always worked satisfactorily in families where no child received more in child support than he or she was entitled to receive in AFDC, it cannot function as intended by Congress if children with greater amounts in child support are forced to join the system. Unless such children have enough child support or enough in arrears to reimburse the state for the whole family's grant, they will never receive more than their proportional share of the AFDC grant and the monthly child support disregard of $50. The child support taken from these children reimburses the state not only for payments on

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> tainly not for the purpose of taking away those very payments which would render the family unit financially solvent and by so doing to leave it in a situation where the governmental agency continues with the burden of making monthly welfare payments.

142 Ga. App. at 355, 235 S.E.2d at 736.

their behalf and on behalf of their caretaker relative, but also for payments made to their needy siblings. Congress never intended in 1974 that the state should divert child support money paid to one child in order to reimburse itself for AFDC payments to other children.[35]

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[35] Congress' intent not to deprive children of the full benefit of their child support income in enacting § 602(a)(26) is also evident in the enactment at the same time of § 602(a)(28) (Supp. III 1985), another section designed to protect needy children giving up child support rights. Not all states provide an AFDC payment which exactly matches the amount by which a family unit's countable net income falls below the state-set payment standard; in some states, the payment is actually less. Section § 602(a)(28) provides that in such states, the state should return to children that portion of their child support that, with the AFDC payment, will bring them up to the point of ineligibility for AFDC. Even if a child's child support income is smaller than the amount of AFDC actually paid out § 602(a)(28) applies, to ensure that becoming an AFDC recipient and assigning away child support rights does not reduce any child's income.

In the legislative history of DEFRA there is no mention of any intent to expand the coverage of § 602(a)(26) to include the support income of non-dependent children. Had Congress intended to use that section, as never before, to deprive non-dependent children of their right to the benefit of all their support income, it would surely have so indicated.

(D) It Was Not The Intent of The 98th Congress to Deprive Any Children of Their Right to Full Benefit From Their Child Support Income Or To Put Unwilling Children On Welfare

Courts nationwide are now faced with lawsuits challenging the legality of the state and federal regulations interpreting § 602(a)(38).[36] That the interpretation of § 602(a)(38) presented above is the correct one is confirmed by analyzing § 602(a)(38)

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[36] See Jurisdictional Statement of Appellants Kirk et al., at 12, n.1 (citing cases).

in the context of the entire Social Security Act, 42 U.S.C. § 301 et seq. (1982 and Supp. III 1985) as amended by the 98th Congress. See Richards v. United States, 369 U.S. 1, 11 (1962) (section of a statute should not be read in isolation from the context of the whole Act).

The Social Security Act is a comprehensive anti-poverty statute, designed, inter alia, to cope with the connected problems of unpaid and inadequate child support, child poverty, and need for AFDC.[37]

The AFDC program was originally devised in 1935 to provide support to "children and families which have been

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37 See generally, H.R. Select Comm. on Children, Youth and Families, 98th Cong., 1st Sess., Federal Programs Affecting Children (Comm. Print 1950) (reference work compiling information on, inter alia, Social Security Act anti-child poverty programs).

deprived of a father's support ... principally families with female heads who are widowed, divorced or abandoned." S. Rep. No. 74-628, 74th Cong., 1st Sess., 17 (1935). Amendments to the Social Security Act in 1975 created the Child Support and Establishment of Paternity Program, 42 U.S.C. §§ 651-667, which reflected the Senate Committee on Finance's statement of principle that "all children have a right to receive support from their fathers."[38] As the Senate Report stated: "[t]he immediate result [of linking the child support enforcement system to the AFDC program] will be a lower welfare cost to the taxpayer but, more importantly, an effective support collection system."[39]

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[38] S. Rep. No 1356, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News, 8133, 8146.

[39] Id. (emphasis added).

Child support has thus long been seen as vital in removing children from the AFDC rolls and from the most abject poverty.

Appellants' interpretation of the intent of Congress in enacting § 602(a)(38) is fundamentally at odds with Congress's recognition of the importance of child support enforcement as the key to removing children from the welfare rolls. Appellants appear to believe that in 1984, the 98th Congress decided to reverse its position that needy children on AFDC should be aided by government to secure adequate child support from absent parents and thus to move from the ranks of the most deprived. The 98th Congress is said by appellants to have decided to confiscate the child support income of non-needy children, requiring those children to receive a smaller sum in return, in the form of an AFDC grant and $50 disregard,

solely because these children live with needy siblings who must apply for AFDC in order to survive economically. The net result of this interpretation is a larger number of recipient children on AFDC, an increase in the number of needy children, and increased strain on child support enforcement agencies nationwide.[40] Nothing could be further from the actual intent of

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[40] In the district court below, District Judge McMillan, based on affidavits submitted by plaintiffs, found that the state and federal regulations, which deprive children of the full benefit of their support income, have

> already discouraged some absent fathers from continuing to honor their support obligations ... These negative paternal reactions present a risk of non-collection ignored by the defendants. The cost of pursuing deliberately delinquent fathers will not be insignificant. Also those fathers who voluntarily provide regular support payments but whose paternity has not been legally established will prove particularly difficult and costly targets for collection.

633 F. Supp. 1529, 1552-3.

the 98th Congress regarding the Social Security Act.

The 98th Congress, far from reversing or diluting the position that children have a right to child support, strengthened the nation's child support enforcement programs for the benefit of all children. In the same session as the 98th Congress added § 602(a)(38) to the Social Security Act, it also unanimously revised Section IV-D of the Social Security Act to affirm the principle that government funded child support enforcement should be available not only to AFDC recipients, but also to all other children who do not want or need AFDC.[41] In doing so, Congress focused on

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41 The Child Support Enforcement Amendments (CSEA) of 1984 thus amend § 651 of the Social Security Act to reflect the newly stated intent of the Act of "assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for aid under Part A [AFDC]) for whom such assist-

the need to help poor children and their mothers, who are usually the custodial parents, to attain independence from federal welfare programs. This focus can be seen in the comments of the Senate sponsors of the Amendments. See, e.g., Statement of Senator Dole:

> It is important to remember that the Federal-State child support enforcement program is designed not to produce revenue for the States and local jurisdictions -- or for the Federal Government. The goal of this program is to collect child support for children at a reasonable cost.... We must all -- Federal, State and local governments -- work harder to insure that all American children receive the financial support to which they are entitled.

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ance is requested." Pub. L. 98-378 § 2, 98 Stat. 1305, 1330, 98th Cong., 2d Sess. (1984) (emphasis added).

It should be noted that the CSEA are particularly instructive in the interpretation of DEFRA amendments, as they are a statute in pari materia, dealing with the same subjects, AFDC and child support, and enacted by the same legislative body at the same time. See Erlenbaugh v. United States, 409 U.S. 239, 244 (1972).

130 Cong. Rec. S4803 (daily ed. April 25, 1984);

Statement of Senator Domenici:

> [D]irect Federal support is only a financial band-aid. The real solution is adequate parental support for [the] children.

130 Cong. Rec. S4807 (daily ed. April 25, 1984);

Statement of Senator Abdnor:

> [T]he vast majority of these custodial parents are women, many of them are struggling to make ends meet . . . . This measure will serve to assist these single parent families while each year saving taxpayers approximately $120 million in welfare payments.

130 Cong. Rec. S4807 (daily ed. April 25, 1984).

The Senate Finance Committee also reiterated in 1984 the principle that "all hildren have the right to receive support from their fathers."[42] This principle is meaningless if read instead to give all

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42 S. Rep. No. 387, 98th Cong., 2d Sess., 6, reprinted in 1984 U.S. Code Cong. & Ad. News 2397, 2402.

states the right to receive the child support paid by absent parents of non-needy children and pass on only a portion of it, if such children happen to live with needy siblings whose economic survival depends on receipt of AFDC assistance.[43] Congressional intent in 1984 could therefore not have been to place non-needy children on AFDC, thereby depriving them of part of their child support income and reducing them to the level of need and welfare recipient status of their needy siblings.

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43 The CSEA have been credited by federal appellant Bowen for "substantial progress in collecting the support which absent parents owe to their children," and for making efforts "even more effective in finding absent parents and collecting the support which is due to their children". Dr. Otis R. Bowen, quoted in "Program May Gain $3.2 Billion for Child Support," N.Y. Times, Dec. 23, 1986 at B5, Col. 3 (emphasis added). Children required by the standard filing unit regulations to live at the economic level of AFDC recipients are not benefitting from this welcome increase in success in child support enforcement.

The 98th Congress took the problem of child poverty very seriously, as an examination of the grim statistics documenting this problem requires.

In 1982 13.5 million children lived in poverty, more than one in five of all children, and seven million of them lived in female-headed single parent households.[44] The poverty of black and Hispanic female-headed families is particularly acute; 66% of black female-headed families with children were poor in 1983.[45] Of the 8.7 million women living with children

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44 Subcomm. on Oversight and Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 98th Cong. 1st Sess., Background Material on Poverty, at 14-16 (Comm. Print 1983).

45 Children in Poverty: Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 99th Cong., 1st Sess. (1985) (statement of Harold Ford, Chairman of Subcomm.).

under 21 years of age whose fathers were not living in the households in 1984, only 5 million were awarded child support, and of the 4 million of them due to receive child support in 1983 only 50 percent received the full payment due.[46] About 26 percent of the 4 million received only partial payment and 24 percent received none of the support due.[47]

Even if Congress intended to recognize that certain income of siblings living with needy children is available to meet the household's common needs, a Congress which contended that all children have a right to receive support from their absent parents,

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46 Bureau of the Census, U.S. Dep't of Commerce, Child Support and Alimony: 1983, Current Population Reports, Series P-23, No. 141, at 11 (1985). In 1984 black and Hispanic women were far less likely than white women to be awarded child support payments. Id. at 2.

47 Id.

could not logically have countenanced depriving a subset of children (those who live with desperately needy siblings) of that right. The 98th Congress did not intend to turn the AFDC safety net into a dangerous poverty trap for children who, fairly remarkably given the statistics above, receive sufficient support from their absent parents so that their custodial parents conclude that it would not benefit them to apply for AFDC.

In sum, even though deference is often accorded the interpretation given a statute by the agency charged with administering it, that deference should never rise to the level of blind faith; a court is obliged to accept the administrative construction of a statute only so far as it is consistent with the intent of Congress in adopting the statute. Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 473 (9th

Cir.), cert. denied, 464 U.S. 892 (1983). This Court should not defer to the administrative construction of § 602(a)(38) by the appellants when there are "compelling indications that it is wrong." Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 94-95 (1973), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). The language, legislative history and purpose of the Social Security Act furnish exactly such compelling indications that appellants are wrong and that their regulations are invalid.

II. § 602(a)(38) VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION BY INVIDIOUSLY DISCRIMINATING AGAINST INDEPENDENTLY SUPPORTED CHILDREN WHO LIVE WITH NEEDY SIBLINGS

As discussed in Section I, supra, this Court should rule that the standard filing unit regulations violate Congressional

intent and thus avoid unnecessary constitutional adjudication. See United States v. Security Industrial Bank, 459 U.S. 70 (1982); Califano v. Yamaseki, 442 U.S. 682, 692-93 (1979); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (1979). However, should this Court decide that Congress intended to reduce independently supported children to the economic level and status of their needy siblings on welfare, § 602(a)(38) must be struck down as constitutionally infirm. This Court should affirm the district court ruling that

> the failure of the state to enforce its own laws restricting the use of [the non-needy child's] income, and the state's taking of the money from his or her mother under duress represent a deprivation of property in violation of the ... Equal Protection Clause ... of the Fourteenth Amendment.

633 F. Supp. at 1555.[48]

Section 602(a)(38) sets up a classification of a subset of children who have a legal right to receive child support from an absent parent. This classification of children, otherwise similarly situated, is made solely on the basis of their adoptive or blood relationships to needy siblings with whom they live.[49] These relationships

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48 This Court has long applied the same equal protection standards to the federal government under the fifth amendment's due process clause as it has to state governments under the fourteenth amendment. Weinberger v. Salfi, 422 U.S. 749, 770 (1975).

49 Toward the end of his brief, at the end of a footnote, the federal appellant contends that "child support recipients who live with needy families are not situated similarly to child support recipients who live in other circumstances." (Brief for federal appellant at 45, n.18). This brief assertion, offered with a citation to three cases but no further elaboration, begs the question. Insofar as the rights of children to receive the full benefit of their child support are concerned, all children of living absent parents are similarly

and living arrangements are beyond the control of the supported children singled out by government for the purpose of this classification. The classification deprives these children of equal protection of child support enforcement laws, and renders the state courts' careful calculations of the children's reasonable needs for child support a travesty.

The district court was correct in applying a heightened scrutiny standard of review to this classification, because it penalizes children on the basis of their family living arrangements.[50] Where the

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situated. See Affidavit of Judge Patricia Hunt, J.A. at 156-161.

[50] The term "heightened scrutiny" is used to signify any standard above the rational basis standard, which requires only that the law have a legitimate purpose and a rational relationship in the fulfillment of that purpose. McGinnis v. Royster, 410 U.S. 263 (1973). For a law to survive heightened scrutiny, it must at least bear a substantial relationship to an important

"government intrudes on choices concerning family living arrangements" in a direct manner, such a level of scrutiny is appropriate. Moore v. City of East Cleveland, 431 U.S. at 499. In the instant case heightened scrutiny must be applied in assessing a classification which clearly intrudes on choices concerning family living arrangements. As the district court found, the classification can force AFDC custodial parents to break up a household by sending supported children away in order to save them from loss of the full benefit

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governmental objective, and be narrowly tailored to serve a compelling state interest. See Craig v. Boren, 429 U.S. 190 (1976); Moore v. City of East Cleveland, 431 U.S. 494 (1977). The three different standards--rational basis, intermediate scrutiny, and strict scrutiny--are simply different approaches to determining whether a classification denies individuals equal protection of the laws. To avoid such a denial, a classification must ensure that "all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

of their child support when their needy siblings file for AFDC. 633 F. Supp. at 1558. See also Affidavit of Mary Medlin, J.A. at 57-59.

The district court was also correct to draw an analogy between this case and Gomez v. Perez, 409 U.S. 535 (1973), another case involving infringement on vital rights to child support from absent parents, in which this Court applied a heightened scrutiny standard of review to strike down a statute denying child support to illegitimate children. This Court held in Gomez that "once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." 409 U.S. at 538. The same analysis and standard of

scrutiny apply to the infringement on a child's essential and judicially enforceable right to needed support solely because the child's custodial parent has other unsupported children living in the same household. The right to receive full benefit from support from an absent parent, as recognized in Gomez, is exactly the right at issue in this case. The illogic, injustice and unconstitutionality of denial are identical in both Gomez and this case.

The District Court also correctly justified application of a heightened scrutiny standard of review by relying on decisions protecting children from discrimination solely based on family circumstances beyond their control. This Court, in Plyler v. Doe, 457 U.S. 202 (1982), recognized that a statute denying free public education to the children of

undocumented aliens was unconstitutional in discriminating against "a discrete class of children not accountable for their disabling status." 457 U.S. at 223. In Plyler, this Court applied a heightened scrutiny standard of review because the denial of education can cause lasting psychological and economic damage to a child. 457 U.S. at 221-223. The deprivation of support from an absent parent can similarly cause a child psychological and economic damage. See Affidavit of Carol Stack, J.A. at 139-156.

While neither education nor child support are rights guaranteed by the Constitution, they are both rights of vital importance to children. It is significant that the Senate Finance Committee emphasized in 1974 and 1984 that "[t]he Committee believes that all children have the right to receive support from their

fathers."[51] In Plyler, this Court concluded that a governmental concern for reducing public expenditures cannot, by itself, justify such an otherwise invidious classification which imposes lasting penalties on innocent children. 457 U.S. at 227, 229. The district court's conclusion to the same effect in this case should be upheld. 633 F. Supp. at 1557.

The governmental purposes put forth by appellants to justify the classification survive neither a heightened scrutiny standard of review nor the less stringent "rational relationship" standard of scrutiny. Thus, even if this Court does not apply a heightened standard of review, the challenged practices fail to pass Constitutional muster.

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51 See supra, pp. 40, 45 (emphasis added).

Federal appellant suggests that the Congressional purpose in enacting § 602(a)(38) was to allocate scarce AFDC payments only to those children it regarded as most needy. (Brief for federal appellant at 41). Section 602(a)(38) has in fact led, as the facts of this case show, to the receipt of AFDC by numbers of children who do not want or need AFDC. 633 F. Supp. at 1543. Those children would not have been classified as "most needy" before 1984 even though they lived in households that already received AFDC.

If the governmental purpose was in fact to reduce the federal deficit by confiscating child support from non-needy children to reimburse state and federal governments for AFDC payments to other children, § 602(a)(38) fails the rational basis test because it is patently arbitrary. As the district court stated,

siblings have no legal duty to support each other, nor singlehandedly to reduce the deficit. 633 F. Supp. at 1554-1555. Further, placing more children on the welfare rolls simply to get governmental control of their child support income is hardly a rational way to save money. As documented above, absent parents may then refuse to pay that support, requiring state child support agencies to go to enforcement expense while also having to continue AFDC payments to the children.[52]

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52 See supra nn. 30 & 40. The argument of federal appellant that the $50 payment of child support passed on to AFDC recipients per month is sufficient incentive to non-custodial parents to continue paying child support is flawed. (Brief for federal appellant at 11). The child still loses that portion of his or her child support that exceeds his or her share of the AFDC grant and the family's $50 per month. While amici curiae in no way condone the failure of absent parents to honor their child support obligations, "[i]t does not require much reflection to understand that an estranged spouse who has money withheld from his paycheck but never

If the governmental purpose behind § 602(a)(38) is instead the paternalistic removal from the AFDC recipient of most of the burden of pursuing non-custodial parents who fail their support obligations (Brief for the federal appellant at 39), the section again fails the rational relationship test. Exactly the same strong child support enforcement measures are available to AFDC and non-AFDC families. It is irrational to pursue a governmental interest in having child support paid to the correct beneficiaries by having the state collect it, and then fail to return part of it to the child on whose behalf the state acted.

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delivered to his children will be less likely to participate in a withholding program." Wilcox v. Petit, No. 85-0342P (D.C. Me. Dec. 9, 1986) (referring to flaws in the $50 return program: even if two months' child support collected in one month, only $50 returned to family).

Appellants are incorrect in seeming to suggest that this Court rubber stamp § 602(a)(38) as constitutional simply because it is social welfare legislation, and because this Court found that Congress could rationally require all siblings to be treated as one household for food stamp allotment purposes in Lyng v. Castillo, 477 U.S. __, 106 S.Ct. 2727 (1986). (Brief for federal appellant at 40-47; brief for [state] appellants at 10-11). Appellees and amici curiae are not before this Court to argue, as many have done unsuccessfully in the cases cited by the federal appellant,[53] that there exists a fundamental right to welfare. This case involves the radically different rights to receive the full benefit of child support and not to be required to be on welfare. Lyng is distin-

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53 Brief for federal appellant, p. 43 n.16.

guishable in that it involved a determination that requiring all siblings to apply for food stamps as one household had a rational relationship to the legitimate governmental purpose of preventing multiple fraudulent applications from one household. 106 S.Ct. at 2729. Rationality is a concept dependent on a particular purpose. The rationality of a practice in one case is thus no precedent in another case involving a very different asserted purpose. Further, in Lyng, this Court did not address the question of whether legally restricted income can rationally be presumed to be available to needy siblings of supported children. Lyng is an inapposite case dealing with asserted rights to receive welfare, which are irrelevant to the right of a child not to receive welfare as a condition of a sibling's welfare eligibility.

Therefore, this Court should affirm the district court's ruling that § 602 (a)(38) is constitutionally infirm in violating the equal protection component of the fifth and fourteenth amendments to the Constitution.

CONCLUSION

For all of the above reasons, amici curiae respectfully request that this Court affirm the holding of the district court below.

Respectfully submitted,

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